

NO. 48324-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DAMIEN RAPHAEL DAVIS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Michael E. Schwartz

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove assault in the second degree, as charged in Count III, beyond a reasonable doubt.

2. There was insufficient evidence to prove assault in the second degree, as charged in Count V, beyond a reasonable doubt.

3. The trial court erred in instructing the jury on general knowledge without instructing the jury on knowledge.

4. Defense counsel was ineffective in failing to propose a jury instruction on knowledge.

5. The prosecutor committed repetitive misconduct during closing argument.

6. Defense counsel was ineffective in failing to object to the prosecutor's misstatement of the law.

7. The trial court abused its discretion by admitting evidence as a prior consistent statement based on its erroneous view of the law.

8. The trial court exceeded its authority by entering Findings of Fact and Conclusions of Law for a 3.5 hearing held by a predecessor judge.

9. Cumulative error denied appellant his constitutional right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is reversal and dismissal required where there was insufficient evidence to prove the essential elements of the second degree assault charges beyond a reasonable doubt? (Assignments of Error 1 and 2).

2. Did the trial court erred in instructing the jury on general knowledge without instructing the jury on knowledge and was defense counsel ineffective in failing to propose an instruction on knowledge? (Assignments of Error 3 and 4).

3. Did the prosecutor commit repetitive misconduct during closing argument by misstating the law, improperly applying the puzzle analogy to reasonable doubt, and impugning defense counsel and was defense counsel ineffective in failing to object to the prosecutor's misstatement of the law? (Assignments of Error 5 and 6).

4. Did the trial court abused its discretion by admitting evidence as a prior consistent statement based on its erroneous view of the law? (Assignment of Error 7).

5. Did the trial court exceed its authority by entering findings of fact and conclusions of law for a 3.5 hearing held by a predecessor judge? (Assignment of Error 8).

6. Is reversal required where cumulative error denied appellant his constitutional right to a fair trial and the presumption of innocence? (Assignment of Error 9).

C. STATEMENT OF THE CASE¹

1. Procedure

On April 5, 2013, the Pierce County Prosecutor's Office, in the name and by the authority of the State of Washington, filed an Information in Pierce County Superior Court, accusing Damien Raphael Davis of committing four crimes as an accomplice. The State charged Davis with one count of murder in the first degree for the death of Donald Philly during the course of a robbery while armed with a firearm, one count of robbery in the first degree against Donald Philly while armed with a firearm, one count of robbery in the first degree against MM while armed with a firearm, and one count of unlawful possession of a firearm in the second degree. Supp

¹ The record consists of 15 volumes of verbatim report of proceedings: 1RP - 09/03/15, 09/29/15; 2RP - 10/12/15, 10/13/15, 10/14/15, 10/15/15; 3RP - 10/19/15; 4RP - 10/20/15; 5RP - 10/21/15; 6RP - 10/22/15; 7RP - 10/27/15; 8RP - 10/28/15; 9RP - 10/29/15; 10RP - 11/02/15; 11RP - 11/03/15; 12RP - 11/04/15; 13RP - 11/05/15; 14RP - 11/09/15; 15RP - 11/24/15.

CP __ (Information, 4/05/13). On March 21, 2014, the Honorable Thomas J. Felnagle held a 3.5 hearing but did not enter written Findings of Fact and Conclusions of Law. Supp CP ____ (Report of Proceedings, 5/11/16). The State filed an Amended Information on May 19, 2014, charging Davis with an additional count of murder in the second degree for the death of Donald Philly. Supp CP ____ (Amended Information, 5/19/14).

On September 19, 2014, the court appointed new counsel for Davis. Supp CP ____ (Order Appointing Counsel, 9/19/14). On September 22, 2015, a new deputy prosecuting attorney filed a Second Amended Information, charging Davis with one count of first degree murder for the death of Donald Phily during the course of a robbery while armed with a firearm, one count of first degree robbery against M. McGlothlen while armed with a firearm, one count of second degree assault with a deadly weapon against K. Devine while armed with a firearm, one count of second degree assault with a deadly weapon against K. Kelly while armed with a firearm, one count of first degree burglary while armed with a firearm, and one count of second degree unlawful possession of a firearm. CP 1-4.

On September 3, 2015, the State called the case for trial before the Honorable Michael E. Schwartz.² 1RP 3-4. On November 9, 2015, a jury

² Davis went to trial with co-defendant Marcus Reed. Two other co-defendants, Daniel Davis and Ariel Abrejera, pleaded guilty and testified for the State.

found Davis guilty of first degree murder while armed with a firearm, not guilty of first degree robbery, guilty of two counts of second degree assault while armed with a firearm, and guilty of first degree burglary while armed with a firearm.³ 14RP 1898-99; CP 311-19.

On November 24, 2015, the court sentenced Davis to 450 months, 84 months, 84 months, and 116 months to be served concurrently; 60 months, 36 months, 36 months, and 60 months on the firearm enhancements to be served consecutively; for a total of 642 months in confinement. The court also ordered community custody and mandatory fees. 15RP 1928-32; CP 333-47.

Davis filed a timely notice of appeal. CP 353-66

2. Facts

a. First Officer on the Scene

Shortly after midnight on March 29, 2013, Sergeant Darren Kelly responded to a 911 call from the Morgan Motel. 2RP 167-70. Dispatch reported a shooting and a victim in a motel room. 2RP 174. Kelly parked at a Rite Aid next to the motel. As he got out of his patrol car, he saw a man standing in front of the motel waving at him. Kelly approached the man who identified himself as Mark McGlothlen. 2RP 175-78. McGlothlen said

³ The State dismissed the charge of second degree unlawful possession of a firearm. 13RP 1768-69; Supp CP ____ (Order of Dismissal, 11/24/15).

two black males just ran past Kelly about five minutes earlier. 2RP 178-79. Kelly went to room no. 8 while McGlothlen waited out on the street. Through the open door he saw a female kneeling over the victim. She identified herself as Kathy Devine. 2RP 181. Kelly told her to come out of the room and he examined the deceased man lying on the floor. 2RP 182. Medics arrived and pronounced the man dead. 2RP 184-85. Other officers arrived to contain the scene. 2RP 185-86.

b. Witnesses in Room No. 8

Kelsey Kelly was staying at the motel with her boyfriend, Donald Phily. 3RP 323-24. Phily did not work and sold meth for money. 3RP 325. She had been staying at the motel for about a week and a half and used heroin and meth during that time. 3RP 324-26. The day before Phily was killed, Damien Davis visited her at the motel. Davis is the father of their four-year-old son. 3RP 322, 326. They talked about their son and she showed him pictures of their son. 3RP 359-60.

Phily was in the room while Davis was visiting and he had a lot of electronics, including computers and phones, out in the open. 3RP 326-27. Kelly talked to Phily about his friend, "Keith," at some time during the ten minutes that Davis was there. After Davis left, she ingested heroin and fell asleep. 3RP 328-29.

Around midnight, Kelly awoke to banging on the door. When she got up from the bed, she saw Phily and two other people in the room. 3RP 329-30. The banging continued and she heard a voice “saying it was Keith.” 3RP 331. Phily stood in front of the door and told them to leave. 3RP 332. Kelly was standing behind Phily when the door opened and a gunshot went off right away. 3RP 333-35. She thought she saw two people but turned away without seeing a gun and ran into the bathroom. 3RP 334. She saw Phily stumble a few feet and fall. Then one of the people came in the bathroom and asked her “where everything was at” and she said she did not know. 3RP 334-35. The person had a gun but she could not remember whether it was pointed at her. The person had on a black coat zipped up past the neck. 3RP 336.

The two people ran out after being in the room for about a minute and she did not see them take anything. 3RP 337-39. She did not recognize them. 3RP 340. Kelly grabbed her stuff from the room and went to her mother’s house. 3RP 338. She was thinking that she just wanted to get out of there because it was scary. 3RP 342.

During an interview on August 14, 2015, Kelly said she could not remember if Davis came to the motel room on the day of the shooting or the day before. 3RP 356. During an interview on April 10, 2013, she told

detectives that there was no conversation about Keith while Davis was in the room. 3RP 358.

Kathy Jo Devine knew Phily for about six or seven years and considered him her big brother, her best friend. 3RP 422-23. He would scold her about her use of methamphetamine because it was affecting her health. 3RP 428. Devine and Mark McGlothen went to visit Phily at the motel around 8:30 or 9:00 at night. 3RP 424-25. When they entered the room, Phily introduced them to Kelly who was laying on the bed. 3RP 426. After visiting for about two or three hours, she heard a knock on the door. 3RP 430, 433. Devine was sitting in a chair by the bathroom with McGlothen sitting in a chair next to her and Phily was sitting on the bed where Kelly was laying. 3RP 433-34. Phily got up and asked who it was and they said "Frank or Ron or something." 3RP 434. Phily told them that if they did not go away there was going to be trouble, and he opened the curtain to look out the window. 3RP 435. Then Phily went to the bathroom to get a box cutter and told her not to move. 3RP 438.

While Phily was facing Devine, the door flew open. As Phily turned around, a guy came in with a gun. 3RP 439-41. Phily and the guy started fighting over the gun and the gun went off in about three seconds. 3RP 441-42. Phily groaned, fell against the wall, and fell in front of her feet. 3RP 442. The second man stood in front of McGlothen holding a gun to

his head. 3RP 441-42. The man who shot Phily started taking things off the table and when she handed him a basket of computer stuff, he thanked her. She did not know if he meant to point his gun at her, but he was more concerned about getting the stuff and getting out of the room. 3RP 444-45. She was shocked and scared because the other man still had his gun pointed at McGlothlen. 3RP 445-46.

The man who shot Phily was wearing a grey pullover sweatshirt with a hood. He was black, taller than her height of five-three, and medium build. 3RP 451-53. The men were in the room for about two minutes and left. 3RP 446. Then Kelly grabbed her stuff and left. 3RP 449. The men never pointed a gun at Kelly. 3RP 463. McGlothlen went outside to find someone with a phone, and she stayed with Phily until the police arrived. 3RP 450.

Mark McGlothlen met Phily through his girlfriend, Kathy Devine. 3RP 365-66. He and Devine went to visit Phily at the Morgan Motel around 10:00 or 10:30 at night. 3RP 366-67. Kelly was at the motel room when they arrived. She was sleeping on the bed and looked like she was sick. 3RP 367-69. While visiting Phily, McGlothlen thought about buying one of his phones to replace the one that he owned. Phily had several smart phones and other electronics on the kitchen table. 3RP 369-70. About 11:30, he heard a loud knock on the door. Phily asked who it was and the guy did not

give his name but said “someone” sent him there to see Phily. 3RP 372. Phily told him to go away and got upset when the guy would not leave. 3RP 372-73. Phily looked out the window and saw something that made him get what looked like a box cutter. 3RP 382-83.

While Phily was walking around in the room, Kelly woke up and went to the door. She turned the knob and the door flew open. 3RP 375. Two men came in. The first man, and then the second man with a gun shot Phily in a matter of seconds. 3RP 376. The shooter was about ten feet away from Phily and then he came up to McGlothlen, put the gun in his face, and threatened him. 3RP 377, 393. The other man had Devine and Kelly gather the electronics and put them in a basket. 3RP 378. His cell phone was on the table but he did not see what happened to it. 3RP 379. The man with the gun followed the other man who carried the basket out the door. 3RP 378-79. McGlothlen knocked on the doors of neighboring rooms to get someone to call 911. He saw the two men running toward Rite Aid. Kelly gathered her belongings and took off. 3RP 380.

The two men were wearing what looked like athletic gear. 3RP 377. The shooter was black or Jamaican, about five-nine or five-ten. He spoke slang, like “from the islands or something.” 3RP 381. The other man was taller and thinner than the shooter who was broader. 3RP 381-82. Both

men were dark complected. 3RP 384. The gun was a black, squared-off Glock. 3RP 382.

c. Co-defendants

Daniel Davis went to the Morgan Motel with Marcus Reed to rob Donald Phily. Damien Davis, his good friend and roommate, was involved in the idea and Ariel Abrejera was the driver. 6RP 726-27, 731. Daniel and Damien lived with Daniel's sister, Melynda Sue Orr-Davis, and another roommate, Shawn Conklin. 6RP 732-33.

During the day before the night of the robbery, Daniel, Damien, and Reed drove to the Morgan Motel where Damien was expecting to see his son after calling Kelly. 6RP 739-41. They parked at the Rite Aid next door and while Damien went to the motel, Daniel and Reed went to the store. 6RP 741-42. Damien returned in about four minutes and said his son was not there so they left. 6RP 742-43. While they were driving back to Daniel's apartment, Damien said he saw electronics in the motel room. 6RP 743-44.

Back at the apartment, while they were talking about how to get some money, Daniel received a text from a guy who wanted to buy some Percocets. They planned how they could rob the guy when he drove up in his car with the money. 6RP 745-46. Damien and Reed went to pick up a gun at Reed's house and returned to the apartment. 6RP 749-52. Reed

decided to have Ariel Abrejera drive them around so they picked her up and went to meet the guy but he changed his mind. 6RP 753, 755-59.

They returned to Daniel's apartment and Damien brought up the Morgan Motel and that Phily had drugs, money, and electronics in the room. 6RP 759. They talked about how to rob Phily and "basically hyped ourselves up and got in the car and drove out there." 6RP 759. Abrejera drove Reed's Crown Victoria, with Reed in the passenger seat and Daniel and Damien in the back. 6RP 761-62. Reed gave Abrejera the directions to the motel. 6RP 765-66. On the way to the motel, they discussed what Daniel and Reed would do. Damien said to use the name Keith and told them which room Phily was in. 6RP 765. Daniel had the gun but when they pulled into the Rite Aid parking lot, Reed said he wanted the gun so he gave it to him. 6RP 762-64. Abrejera and Damien waited in the car while Daniel and Reed walked to the motel. 6RP 766.

Daniel and Reed agreed that Daniel would enter the room first and Reed would follow, "I was going to barge my way in, and he was just going to brandish the gun, and just let it be known that there was a gun and nothing was supposed to go off." 6RP 767. When they got to the room, Reed knocked on the door and said "it's Keith." 6RP 767. Phily told them to go away when Reed kept knocking on the door for about a minute. 6RP 768-69. Then the door opened and Daniel pushed the door in and went toward

Phily. Reed came in right behind him and while he was scuffling with Phily, the gun went off. 6RP 769. Phily fell to the ground and Kelly ran to the bathroom. 6RP 772-73. There were two other men in the room and another woman who was sitting on the ground. 6RP 774. Reed kept saying, "I'm sorry. I'm sorry." 6RP 773. Daniel apologized to Kelly, grabbed all the cell phones and laptops that he could, and ran to the car. 6 RP773.

When Daniel got to the car, Damien and Abrejera asked him if the noise they heard was a gunshot. Then Reed came around the corner carrying a basket full of stuff and they drove off. 6RP 780. While in the car, he realized he had blood on him from a gash on his right arm. He put some bandages on his wound when they returned to his apartment. 6RP 788. He thought he was grazed by the bullet when Phily was shot because he did not see Phily with a weapon. 6RP 790-91.

Daniel identified himself, Damien, and Reed on a Rite Aid surveillance video from the night of the robbery. 6RP 819-826. He is a white male. 6RP 857-58. Daniel acknowledged that he had a long criminal history, including several felonies. 6RP 828-31. After he was arrested, he was facing 60 to 70 years in prison but by testifying for the State, his sentence would be reduced by 40 to 50 years. 6RP 830-33. He lied during his initial interview with police, claiming that he participated in the robbery because Reed coerced and threatened him. 6RP 833-38.

On the night of March 28, 2013, Ariel Abrejera received a phone call from Marcus Reed who said he was going to come by her apartment. Around 10:00 or 10:30, Reed called and said he was outside so she walked out to the parking out where he asked her to get in his car. 9RP 1296-98. When she got in the car, she saw Daniel Davis and Damien Davis in the back seat. RP 1298. Reed got in the passenger seat and asked her to drive. 9RP 1298. Damien gave her directions to Rite Aid. While she was driving, she heard Daniel and Damien talking about a robbery. Damien said to use a name to get into the room and he gave the name and room number and said the man "has some things." 9RP 1299-1301. Reed was not involved in the conversation. 9RP 1304. She saw a black gun in Daniel's lap. RP 1302. She did not know whether Damien knew about the gun. 9RP 1418-19.

Abrejera parked at Rite Aid, turned off the lights, and kept the engine running. 9RP 1304. Reed and Daniel got out of the car and walked toward the Morgan Motel. 9RP 1305. In about a minute, she heard a sound and then realized it was a gunshot. 9RP 1307, 10RP1361. A couple of seconds later, Reed and Daniel came back to the car and Daniel was carrying a wicker basket full of miscellaneous junk. 9RP 1308-09. Daniel and Damien told her to drive back to Daniel's apartment. 9RP 1310. Daniel

was kind of freaked out about an injury on his arm. 10RP 1369. Shortly after they arrived at the apartment, Reed took her home. 9RP 1313-14.

The next day, Reed picked up Abrejera and they went to his house where she borrowed his other car and drove to Daniel's apartment. 10RP 1377-79. Daniel gave her a backpack and said, "Here, can you deal with this." 10RP 1380. She took the backpack knowing that a gun was in it and tossed it in the trunk of the car and drove home. 10RP 1380-81. Three days later, she took the backpack out of the trunk and put it in her bedroom. 10RP 1384. That evening, she took the gun out of the backpack, put it in a red bag, drove out to the woods, and left the bag under a bunch of brush. 10RP 1387-89.

Abrejara accepted a plea offer to testify for the State in exchange for reducing a sentence between 31 to 39 years down to 41 months. 10RP 1391, 1397-98. She cooperated with the State because when she thought about going to prison for almost 40 years, it was "a scary feeling." 10RP 1429.

d. Witnesses at Apartment

Melynda Sue Davis-Orr, Daniel Davis's half sister, was renting an apartment where she lived with Daniel, Damien Davis, and Shawn Conklin. 8RP 1201-03. Approaching midnight on March 28, 2013, Daniel, Damien, and Marcus Reed were hanging out at the apartment and she heard them talking about wanting to "hit a lick," which means rob somebody. 8RP

1209-12. They left thereafter and she went to sleep in her bedroom. 8RP 1213. Around 2 or 3 a.m., she awoke when they returned. Daniel said he got stabbed in the arm during a fight and she helped him clean his wound. 8RP 1213-15. Reed was being loud and obnoxious while Damien was quiet with his head down. 9RP 1262-63.

The next morning, she saw broken tablets and cell phones in a basket. 8RP 1218-20. When she kept asking Daniel how he got injured, he admitted that he, Damien, and Reed were involved in the shooting at the Morgan Motel. 8RP 1221-23. Daniel said he was shot in the arm when someone grabbed Reed from behind which caused him to accidentally pull the trigger on his gun. 8RP 1222-23, 9RP 1250-51.

Davis-Orr admitted that she smokes marijuana a lot which affects her memory. 9RP 1246, 1261. She never told the police during two interviews that she heard Daniel, Damien, and Reed say they were going to do a lick. 9RP 1247-49.

Crystal Palamidy met Daniel Davis through her neighbor and friend, Melynda Davis-Orr. 8RP 1075-76. She went to Davis-Orr's apartment for a cigarette around 11:30 on the night of March 29, 2013. 8RP 1079-80. Daniel, Damien Davis, Ariel Abrejera, Marcus Reed, and Shawn Conklin were there and Davis-Orr had gone to bed. 8RP 1080-81. When she walked into the apartment, she could tell something was wrong when she saw that

Daniel had a wound on his arm. 8RP 1093. She heard Daniel and Reed talking about hitting a lick and they were not happy with what they got. 8RP 1094-95. She saw broken cell phones and broken tablets sprawled throughout the apartment. 8RP 1103-04. Damien was not involved in the conversation. 8RP 1096. He was quiet and appeared scared, “just kind of wanting to separate from the whole thing.” 8RP 1137. Later that night, Daniel told her that he and Reed went into a room to rob a person and Reed pulled out a gun. The man fought back and the gun went off. Reed fired three shots. The second shot grazed Daniel’s arm. Abrejera drove the car and Damien stayed in the car. 8RP 1101-02; 1119-20.

Shawn Conklin lived with Melynda Davis-Orr and her brother Daniel Davis. 8RP 1159-61. He and Marcus Reed worked together for a while and he became friends with Damien Davis who would come over to the apartment to hang out. 8RP 1162-63, 1165. On the night of March 29, 2013, he came home from work and went to sleep in the living room around 1 a.m. 8RP 1161, 1166. He woke up when Daniel, Damien, Reed, and a woman came in with a box full of broken laptops and another box with beer and a lot of gift cards. 8RP 1166-71, 1174. The woman started patching up Daniel’s arm and Reed began pacing back and forth while talking. 8RP 1171-73. Damien sat in the corner, “kind of just looking down on the ground, looked scared, wasn’t talking to anyone really, just keeping to

himself.” 8RP 1172. In the morning, everything was gone and he moved out of the apartment after getting into an altercation with Davis-Orr. 8RP 1174-75.

e. Other Witnesses

Detective Steven Reopelle with the Tacoma Police Department homicide unit was assigned as the lead detective in the case. He organized a team of detectives and managed the case. 5RP 656-58. During his investigation, he conducted several interviews. 11RP 1622.

On April 2, 2013, Detective Reopelle and another detective interviewed Daniel Davis at the police station. Over objections by defense counsel, the court admitted the recorded interview into evidence. The trial court allowed the State to provide the jurors with a transcript of the interview as a listening aid while the recording was played in court. 11RP 1725-28.

On April 3, 2013, Tacoma police arrested Damien Davis and transported him to the police station. After Detective Reopelle and another detective spoke with Damien for an hour and a half, he agreed to a recorded interview. 5RP 670-71, 675-76. Over objections by defense counsel, the court admitted the recording into evidence. With permission from the trial court, the State provided the jurors with a transcript of the interview as a listening aid while the recording was played in court. 5RP 671-73.

In its case in chief, the State called 15 government witnesses and 9 civilian witnesses. Damien Davis and Marcus Reed did not testify. 12RP 1748.

D. ARGUMENT

1. REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE TWO ASSAULT CHARGES BEYOND A REASONABLE DOUBT.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *In re Winship*, 397 U.S. 358, 362-63, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational juror could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If the evidence is insufficient, the conviction must be reversed and the case dismissed with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Whether evidence is sufficient is a question of constitutional law reviewed de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

- a. Assault in the second degree for intentionally assaulting Kelsey Kelly with a deadly weapon.

The trial court provided the jury with the definitions for assault, intent, and bodily injury:

An assault is an intentional touching or shooting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or shooting is offensive if the touching or shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an *act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury*, even though the actor did not actually intend to inflict bodily injury.

CP 258-310 (Jury Instruction No. 31)(emphasis added).

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

CP 258-310 (Jury Instruction No. 16).

Bodily injury means physical pain or injury, illness, or an impairment of physical condition.

CP 258-310 (Jury Instruction No. 27)

The court instructed the jury that:

To convict Damien Davis of the crime of assault in the second degree, as charged in Count V, each of the following two elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 29, 2013, defendant Damien Davis or an accomplice *assaulted Kelsey Kelly with a deadly weapon*; and
- (2) That this act occurred in the State of Washington.

CP 258-310 (Jury Instruction 35)(emphasis added).

Kelsey Kelly testified that she was standing behind Donald Phily when the door opened and she saw two people. 3RP 334, 353. A gunshot went off right away but she did not see a gun. 3RP 334. She saw Phily stumble a few feet and fall. 3RP 334. She immediately turned around and ran to the bathroom because she was scared. 3RP 334, 353, 360.

As she was crouching down near the bathroom sink, one of the people came in and asked her where everything was at and she said she did not know:

Q. Okay. Did this person have anything in their hand?

A. A gun.

Q. Where was the gun pointed?

A. I don't remember.

Q. Was it pointed at you?

....

A. I don't remember.

3RP 335-36.

Kelly was thinking that she just wanted to get out of the motel room:

Q. Why did you want to get out of there?

A. Because it was scary.

Q. Okay. Specifically what were you scared of?

A. Someone just got shot.

Q. And what else were you scared of?

A. Nothing.

Q. How did you feel when the man came into the bathroom with a gun in his hand?

....

A. I couldn't tell you how I was feeling then. Scared.

3RP 342.

Kelly's testimony established that she felt scared because someone just got shot. She was not scared of anything else. The person came into the bathroom with a gun but she could not remember where the gun was pointed. At first she could not describe how she felt but then said she felt scared. Kathy Devine testified that no gun was ever pointed at Kelly. RP 463. There was absolutely no evidence that the person threatened Kelly with the gun or directed the gun at her. She never said that the person made her fearful that she would be injured. The record clearly substantiates that there was no evidence that the person intended to make Kelly apprehensive and fearful of bodily injury using the gun and in fact created a reasonable apprehension and imminent fear of bodily injury.

Consequently, even when admitting the evidence as true and drawing all reasonable inferences therefrom while viewing the evidence in the light most favorable to the State, no rational juror could have found that Davis or an accomplice assaulted Kelly with a deadly weapon. Reversal and dismissal is required because there was insufficient evidence to prove the essential elements of assault in the second degree, as charged in count V, beyond a reasonable doubt.

- b. Assault in the second degree for intentionally assaulting Kathy Devine with a deadly weapon.

The trial court provided the jury with the definitions for assault, intent, and bodily injury and instructed the jury that:

To convict defendant Damien Davis of the crime of assault in the second degree, as charged in Count III, each of the following two elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 29, 2013, defendant Damien Davis or an accomplice *assaulted Kathy Devine with a deadly weapon*; and
- (2) That this act occurred in the State of Washington.

CP 258-310 (Jury Instruction No. 33)(emphasis added).

Kathy Devine testified that Donald Phily was standing in front of her when the door opened. A guy with a gun came in and Phily and the guy started fighting over the gun. The gun went off in about three seconds and Phily fell down in front of her feet. 3RP 441-42. A second man stood by the door with a gun against Mark McGlothlen's head. 3RP 441-42.

The man who shot Phily started taking things off the table:

- Q. And so this man takes the basket and takes the cell phone?
A. Right.
Q. Do you remember him taking anything else?
A. Whatever was on the table.
Q. And you said he thanked you?
A. Because I handed him the basket because he had to lean over me.
Q. And you remember him thanking you for it?
A. Yes.
Q. And did he say anything else?
A. No.

Q. What's this man doing with the gun at that time?
 A. It's like he pointed at me, but not pointed at me.
 Q. Can you explain that?
 A. It's like it was pointing it at me, but not. It's kind of hard.
 Q. How is he --
 A. I don't know if he was meaning to, but it was pointed at me.
 Q. And how?
 A. And he was more concerned about getting the stuff and getting out of the room.
 Q. And how are you feeling at this time?
 A. Shocked, um . . .
 Q. Can you explain it any further?
 A. Angry.
 Q. Any other emotions at this time?
 A. Scared.
 Q. Why?
 A. The one guy still had a gun pointed at Mark.
 Q. How long were these two men in the room?
 A. Two minutes.
 Q. And after the man that shot Mr. Phily grabs the basket and the cell phone, what does he do?
 A. He leaves.

3RP 445-46.

Devine testified further that she told the man who shot Phily to shoot her:

Q. . . . And after he shot, Mr. Damien Davis, seated at counsel table, shot Mr. Phily, you told the shooter to go ahead and shoot you; is that correct?
 A. Yes, I did.
 Q. Because you didn't want to live if something happened to Mr. Phily; is that right?
 A. Right.
 Q. Because that's how close you were?
 A. Right.
 Q. And this person other than -- this person, the shooter, other than thanking you when you gave him the basket, nothing else was said to you, correct?

A. No.

....

Q. You saw -- your best friend, is that Mr. Phily?

A. Right.

Q. Best friend shot?

A. Yes.

....

Q. Were you worried that you were going to get shot that night?

A. Yes.

Q. For any reason that you could tell?

A. That I asked him to.

Q. Other than that?

A. No, I wasn't sure.

3RP 470, 486.

Devine's uncertainty throughout her testimony raised reasonable doubt. Her testimony established that the man with a gun thanked her for handing him the basket and she was not sure if he meant to point the gun at her. He was more concerned about getting the stuff and getting out of the room. If she had not asked the man to shoot her, she was not sure if she was going to get shot. She never said the man made her fearful that she would be injured. Although Devine said she was scared because the other man had a gun pointed at McGlothen, she did not say that he made her fearful that he would use the gun on her. The record substantiates that there was absolutely no evidence that the man intended to make Devine apprehensive and fearful of bodily injury using the gun and in fact created a reasonable apprehension and imminent fear of bodily injury.

Even when admitting the evidence as true and drawing all reasonable inferences therefrom while viewing the evidence in the light most favorable to the State, no rational juror could have found that Davis or an accomplice assaulted Devine with a deadly weapon. Reversal and dismissal is required because there was insufficient evidence to prove the essential elements of assault in the second degree, as charged in count III, beyond a reasonable doubt.

2. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON GENERAL KNOWLEDGE WITHOUT INSTRUCTING THE JURY ON KNOWLEDGE AND DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO PROPOSE AN INSTRUCTION ON KNOWLEDGE.

Appellate courts review jury instructions de novo within the context of the jury instructions as a whole. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006)(citing *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)). Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002)(citing *State v. Riley*, 137 Wn.2d 904, 908 n. 1, 909, 976 P.2d 624 (1999)).

Here, the State crafted and proposed a jury instruction on general knowledge:

The State must prove an accomplice had general knowledge of the charged crime. The State is not required to prove the accomplice had knowledge of every element of the charged crime.

Thus, the State must prove an accomplice in a charged crime of robbery in the first degree had general knowledge of the crime of “robbery.” The State is not required to prove an accomplice had knowledge that another participant would be armed with a deadly weapon or would inflict bodily injury.

The State must prove an accomplice in a charged crime of burglary in the first degree had general knowledge of the crime of “burglary.” The State is not required to prove an accomplice had knowledge that another participant would be armed with a deadly weapon or would assault any person.

The State must prove an accomplice in a charged crime of assault in the second degree had general knowledge of the crime of “assault.” The State is not required to prove an accomplice had knowledge the assault would be committed with a deadly weapon.

CP 51-126 (Jury Instruction 23).

Over defense counsel’s objection, the court found that it was proper to give the instruction: “That is the correct statement of the law. It doesn’t mislead the jury, and does allow the State to argue their theory of the case.”

12RP 1759, 1761-62.

The court also instructed the jury on accomplice liability:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, *with knowledge* that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP 258-310 (Jury Instruction No. 19)(WPIC 10.51)(emphasis added).

Defense counsel did not propose, and the court did not give, an instruction on the definition of knowledge:

A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact. [It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.]

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

WPIC 10.02 (emphasis added).

As the Washington Supreme Court emphasized in *State v. Studd*, 137 Wn.2d 533, 553-54, 973 P.2d 1049 (1999)(Madsen, J. concurring), the pattern jury instructions are the result of the considerable work of the Washington Supreme Court Committee on Jury Instructions. The Court observed that:

The pattern jury instructions reduce the time and effort which must be expended on the preparation of jury instructions in the day to day

trial of cases. Furthermore, these pattern instructions have greatly enhanced the quality of justice in our courts by improving the quality of instructions given to juries. The intention is to present patterns for simple, brief, accurate and unbiased statements of the law. . . . We recommend the use of these pattern instructions.

The general knowledge jury instruction crafted by the State and given by the court was not a pattern jury instruction. Although the Committee was aware of the law as indicated in its comments for its accomplice instruction, WPIC 10.51, it never drafted a general knowledge instruction. However, in the Committee's Note on Use, it states, "Use WPIC 10.02 Knowledge--Knowingly--Definition with this instruction." As the Washington Supreme Court recognized in *State v. Scott*, 110 Wn.2d 682, 692, 757 P.2d 492 (1988), "For certain offenses--complicity being one--definitional instructions of "knowledge" are recommended. See WPIC 10.51, Note on Use."

The trial court erred in giving the general knowledge instruction not based on a WPIC over defense objections without giving the knowledge instruction, WPIC 10.02. The court's reasoning that the general knowledge instruction allowed the State to argue its theory of the case was misplaced because the purpose of jury instructions is to allow both parties to argue their theories of the case, not just the State. Moreover, the State's proposed instruction on general knowledge submitted to the court cites the Note on Use for WPIC 10.51 which directs the court to use WPIC 10.02. CP 51-

126 (Jury Instruction 23). The court ignored the WPIC Committee's recommendation. As a consequence of the court's error, when read as a whole, the jury instructions did not completely inform the jury of the applicable law pertaining to knowledge.

Furthermore, defense counsel provided ineffective assistance of counsel in failing to propose WPIC 10.02. To demonstrate ineffective assistance of counsel, a defendant must show that defense counsel's representation was deficient and defense counsel's deficient representation prejudiced defendant. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)(citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)(applying the two-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984))).

Defense counsel's representation was deficient where knowledge was a critical element of accomplice liability. WPIC 10.02 was all the more important because the general knowledge instruction crafted by the State focused the jury's attention on knowledge and went so far as to specifically explain the level of knowledge for robbery, burglary, and assault. If the jury had been instructed on knowledge, defense counsel could have expanded on his closing argument where he asked the jury to consider the circumstances surrounding Damien's involvement. 13RP 1848-76. He could have argued that even if Davis had information that would lead a

reasonable person in the same situation to believe that he was aiding in a crime, under the law, the jury is permitted but *not required* to find that he acted with knowledge. The definition of knowledge was essential to advance the defense theory of the case that Davis did not knowingly aid in the commission of the crimes. Davis was prejudiced by defense counsel's deficient representation because the jury was not told that it could find that he did not act with the knowledge that he was aiding in a crime despite what a reasonable person would have believed in the same situation.

“Every person charged with the commission of a crime is presumed innocent unless proved guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt.” RCW 9A.04.100(1). It is reversible error to instruct the jury in a manner that would relieve the State of its burden to prove every essential element of a crime beyond a reasonable doubt. *State v. Byrd*, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995). Davis's convictions must be reversed because the error in giving the State's tailor-made general knowledge instruction without giving WPIC 10.02, the knowledge instruction, failed to fully instruct the jury on the element of knowledge thereby relieving the State of its burden to prove every essential element beyond a reasonable doubt.

In the alternative, an error in jury instructions is subject to a constitutional harmless error analysis where in order to hold the error harmless, a reviewing court must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. *State v. Brown*, 147 Wn.2d 330, 339-41, 58 P.3d 889 (2002). A jury is “made up of human beings whose condition of mind cannot be ascertained by other human beings. Therefore it is *impossible* for courts to contemplate the probabilities any evidence may have upon the minds of jurors.” *State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946)(emphasis added). If the jury had been properly instructed, it could have viewed the evidence in a different light. Accordingly, reversal is required because this Court cannot conclude beyond a reasonable doubt that the verdicts would have been the same without the prejudicial effect of the court giving the general knowledge instruction without giving the knowledge instruction thereby not fully instructing the jury on the essential element of knowledge.

3. THE PROSECUTOR COMMITTED REPETITIVE MISCONDUCT BY MISSTATING THE LAW, IMPROPERLY APPLYING THE PUZZLE ANALOGY TO REASONABLE DOUBT, AND IMPUGNING DEFENSE COUNSEL DURING CLOSING ARGUMENT.

A prosecutor “functions as the representative of the people in a quasijudicial capacity in a search for justice.” *State v. Monday*, 171 Wn.2d

667, 676, 257 P.3d 551 (2011)).⁴ A prosecutor does not fulfill this role “by securing a conviction based on proceedings that violate a defendant’s right to a fair trial—such convictions in fact undermine the integrity of our entire criminal justice system.” *State v. Walker*, 182 Wn.2d 463, 476, 341 P.3d 976 (2015). The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendment and article I, section 22 of the Washington Constitution. *In re Personal Restraint of Glasman*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). Prosecutorial misconduct may deprive the defendant of his constitutional right to a fair trial. *Id.* at 703-04 (citing *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984)).

a. Misstatements of the Law

A prosecuting attorney commits misconduct by misstating the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015)(citing *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008)). “The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential of misleading the jury.” *Davenport*, 100 Wn.2d 757 at 763. This is because “[t]he jury knows that the prosecutor is an officer of the State.” *Warren*, 165 Wn.2d at 27.

⁴ “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.” RPC 3.8, Comment [1].

The prosecutor here told the jury to focus on the central issue in this case:

There is really only one, because when you think about this central issue, *you came to realize that if Damien Davis and Marcus Reed were party to a robbery, they are guilty of the charged offenses here.* If they were party to a robbery, their guilt as to each of these offenses flows naturally.

13RP 1787 (emphasis added).

The prosecutor clearly misstated the law because being a party to a robbery does not make Davis guilty of all the charged offenses. Davis was charged for the first degree murder of Donald Phily committed during the course of a robbery. The jury could therefore find Davis guilty of first degree murder if it found that he or an accomplice caused the death of Phily during the course of a robbery. CP 258-310 (Jury Instruction 23). However, the jury could not find Davis guilty of assaulting Kelly, assaulting Devine, robbing McGlothlen, and committing burglary solely on the basis of being a party to the robbery of Phily. CP 259-310 (Jury Instructions 29, 33, 35, 41).

The prosecutor continued to misstate the law, arguing that Kelly and Devine were victims of assault because Reed and Daniel Davis came into the room and shot Phily:

. . . . If I shoot someone in your presence, guess what? You are scared out of your mind that you might be next. *And so, when Ms. Devine and Ms. Kelly witnessed Mr. Phily shot inexplicably with a*

gun and he is dying in front of them, are they victims of an assault at that moment? Absolutely. Absolutely. The men who come into that room have put them in fear for their lives. And again, that assault was perpetrated with a firearm, and it is the very act of coming into that room and shooting Mr. Philly in their presence with Ms. Devine and Ms. Kelly watching, watching that gun go off, and if they didn't see the gun, watching him be shot, and if they didn't see him watching him be shot, hearing him, watching him stumble to the ground, clearly having been shot by a gun, the men in the room with a gun, they are clearly victims of an assault, and that assault has been perpetrated with a gun, with a firearm. . . .

13RP 1811-14 (emphasis added).

The prosecutor argued further during rebuttal:

. . . . The act that Mr. Reed and Daniel Davis did, *the act that they did that makes them responsible for Second Degree Assaults for Ms. Devine and Ms. Kelly, the act, it's barging into the room.* That is an act, barging into a room. They are there. They are guests. This is a happy place. It's supposed to be a happy place, and two men, uninvited, forced their way in. That's the act, and then one of those men has a gun, and then one of those men shoots Philly. . . .

13RP 1889-90.

The prosecutor absolutely misstated the law because second degree assault of Kelly and Devine required more than "barging" into the room and shooting Philly while Kelly and Devine were in the room. As defined in the jury instruction, an assault is "an act done with *the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury* even though the actor did not actually intend to inflict bodily injury." CP 258-310 (Jury Instruction No. 31)(emphasis added). A prosecutor's argument

must be confined to the law stated in the trial court's instructions. *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972).

b. Puzzle Analogy

An "analogy" is the "similitude of relations which exist between things compared" and "analogous" means "bearing some resemblance or likeness that permits one to draw an analogy." *Black's Law Dictionary*, 6th Ed., p.84.

The prosecutor started to explain the meaning of proof beyond a reasonable doubt by telling the jury to think about getting on a ferry where there is a puzzle. Defense counsel objected and the court excused the jury to hear argument. 13RP 1778-79. Defense counsel argued that the puzzle analogy is improper because it trivializes and misstates the State's burden of proof beyond a reasonable doubt. 13RP 1779-80. The prosecutor argued that there is "very clear appellate authority that simple use of the puzzle analogy where you are not quantifying the burden of proof is not improper in any respect." 13RP 1780-81. The court discussed several cases involving puzzle analogies and determined that while the analogy has come under criticism in a number of different forms, it depends on what the State does with the analogy. 13RP 1781-83. The court concluded that the State cannot diminish what the burden of proof is by using the analogy and cannot use it "in the regard that certain people often require when they make

everyday decisions.” 13RP 1783. The court overruled the objection, declaring that the prosecutor “knows the limitation of use of this type of analogy.” 13RP 1785.

The prosecutor continued with his puzzle analogy:

We are talking about proof beyond a reasonable doubt, and I’m offering you an analogy that may or may not make sense to you or be helpful. Think about going on a ferry, and for those that have gone on a ferry, oftentimes there are puzzles on a table left behind. Sometimes the boxes are there, sometimes they are not. Imagine no box, and so you don’t know what the image is. You sit down to do a puzzle and you are putting it together and there are pieces and you just don’t know what to do with them. You have tried it on every conceivable spot. You can’t figure it out, so you set it aside.

There may have been pieces of the puzzle that, frankly, were gone before you even sat down to do the puzzle. You may at some point get to the point of putting together that puzzle and realize what the image is. And you are confident beyond a reasonable doubt as to what that image is, even though, maybe again, there were pieces that disappeared before you even sat down, even though there are pieces that you had to set aside because you don’t know what to do with. . . .

13RP 1785-87.

In *State v. Lindsay*, the Washington Supreme Court concluded, “When a prosecutor compares the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the gravity of the standard and the jury’s role.” 180 Wn.2d 423, 436, 326 P.3d 125 (2014)(citing *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)). The Court held that using everyday experiences as an analogy to

explain reasonable doubt trivializes the State's burden of proof and is improper. *Id.*

The prosecutor used the everyday experience of riding on a ferry and shaping a puzzle to explain reasonable doubt. This different version of the puzzle analogy is improper because there is nothing similar about figuring out a puzzle while leisurely taking a ferry ride and deciding in a murder trial whether the State has met its burden of proving guilt beyond a reasonable doubt. By comparing putting together a puzzle on a ferry to deliberating in a jury room to determine guilt or innocence, the prosecutor improperly minimized and trivialized the gravity of the standard of proof and the role of the jury. The reasonable doubt standard must not be diluted because it is "important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." *In re Winship*, 397 U.S. at 364.

As the Supreme Court held in *State v. Bennett*, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007), WPIC 4.01⁵ adequately instructs the jury on reasonable doubt and permits both the government and the accused to argue

⁵ A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt. CP 258-310 (Jury Instruction 2).

their theories of the case. In light of the continued use of improper variations of the puzzle analogy, this Court should abolish the puzzle analogy completely because it is unnecessary, distracts the jury, and does not further the ends of justice.

c. Impugning Defense Counsel

It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn defense counsel's integrity. *State v. Thorgerson*, 172 Wn.2d 438, 451, 258 P.3d 43 (2011)(citing *Warren*, 165 Wn.2d at 17, 29-30, 195 P.3d 940 (2008)); *State v. Negrete*, 72 Wn. App. 62, 67, 863 P.2d 137 (1993).

The prosecutor here began his rebuttal by telling the jury that it is his opportunity to respond to defense counsels' arguments:

. . . and to that end I want you to understand, and I'm sure that you appreciate, the State, both myself and Ms. Kavanaugh, have a great deal of respect for Mr. Underwood and Ms. Ko and the job that they do. Everyone who is charged with a crime is entitled to representation. And everyone is entitled to a vigorous representation and an advocate that will fight for you, *but don't confuse vigorous advocacy with there being any merit to what Ms. Ko and Mr. Underwood said to you during their comments.*

13RP 1878 (emphasis added).

The prosecutor's statement that defense counsels' closing arguments were meritless was improper. By insinuating that the job of defense counsel is to be a vigorous advocate and make meritless arguments,

the prosecutor improperly impugned their integrity. Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his case and are therefore impermissible. *Lindsay*, 180 Wn.2d at 432 (citing *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1963)(per curiam)).

d. Prejudice

Where the defense claims prosecutorial misconduct, it bears the burden of establishing the impropriety of the prosecutor's statements as well as their prejudicial effect. *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002, 245 P.3d 226 (2010). If the statements were improper, and an objection was lodged, the defense must show that there was a substantial likelihood that the statements affected the jury. *Id.* Absent an objection and request for a curative instruction, the defense waives the issue of misconduct unless the statement was so flagrant and ill intentioned that an instruction could not have cured the prejudice. *Id.* Deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. *In re Glasmann*, 175 Wn.2d at 696.

Here, Davis's counsel did not object to the prosecutor's misstatements of the law and improper impugning of defense counsel. 13RP 1787-88, 1811-14, 1878, 1889-90. Co-counsel objected to the

prosecutor's first misstatement of the law and improper impugning of defense counsel but the court overruled her objections. 13RP 1787-88, 1878. The court also overruled defense counsels' objections to the prosecutor's improper puzzle analogy. 13RP 1778-85.

"Repetitive misconduct can have a cumulative effect." *Allen*, 182 Wn.2d at 376. In cases of prosecutorial misconduct, the touchstone is whether the misconduct deny the defendant his due process right to a fair trial. *Davenport*, 100 Wn.2d at 762. The prosecutor committed repetitive misconduct throughout closing argument by misstating the law, improperly applying the puzzle analogy to reasonable doubt, and impugning defense counsel. Furthermore, the trial court incorrectly overruled defense objections which validated the misconduct. *Davenport* 100 Wn.2d at 764 (overruling a timely and specific objection lends "an aura of legitimacy to what was otherwise improper argument).

Additionally, Davis's counsel provided ineffective assistance of counsel in failing to object to the prosecutor's misstatement of the law that Kelly and Devine were victims of assault because Reed and Daniel Davis barged into the room and shot Phily in front of them. To prove that failure to object rendered counsel ineffective, a defendant must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial

would have been different if the evidence had not been admitted. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). The record substantiates that counsel's failure to object fell below prevailing norms where the prosecutor's misstatement, which mislead the jury, was clearly contrary to the jury instruction on assault and therefore an objection would likely have been sustained. Consequently, the result of the verdicts on the assault charges would have been different where there was insufficient evidence to prove the assaults beyond a reasonable doubt.

Reversal is required because, cumulatively, Davis was prejudiced by the prosecutor's repetitive misconduct and denied his constitutional right to a fair trial.

4. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING EVIDENCE AS A PRIOR CONSISTENT STATEMENT BASED ON ITS ERRONEOUS VIEW OF THE LAW.

A trial court's decision to admit evidence is reviewed for abuse of discretion. *State v. Thomas* 150 Wn.2d 821, 856, 83 P.3d 970 (2004), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.12 177 (2004). "A trial court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law." *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010)(citing *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

Hearsay is a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is not admissible except as provided by these evidentiary rules, by other court rules, or by statute. ER 802. A statement is not hearsay if:

The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. . . .

ER 801(d)(1).

This Court recognized that ER 801(d)(1) is not the all-inclusive source for determining the admissibility of a statement:

The rule, though it expands the significance of the statement (once admitted), is procedurally only a limitation on admissibility. For initial determination of admissibility we look to common law rules of evidence or to other portions of the judicially pronounced rules which govern admissibility. The first and universally necessary criterion is relevancy. *See* ER 401.

State v. Harper, 35 Wn. App. 855, 857, 670 P.2d 296 (1983), *review denied*, 100 Wn.2d 1035 (1984).

The general rule is that a witness' testimony cannot be corroborated or bolstered by presenting to the factfinder evidence that the witness made the same or similar statements out-of-court—for the simple reason that repetition is not generally a valid test for veracity.

Harper, 35 Wn. App. at 857 (citing *Thomas v. French*, 99 Wn.2d 95, 659 P.2d 1097 (1983)).

Here, the State moved to admit a recorded interview detectives had with Daniel Davis the day he was arrested. The State argued that Daniel's "arrest statement" is admissible as "a prior consistent statement" because the defense suggested that his "testimony could not be believed because of the plea he entered." 11RP 1467-68. The State contended that the core of Daniel's testimony "was consistent with the statement he gave at the time of his arrest when he was not contemplating a plea agreement. And that is exactly what the evidence rule contemplates." 11RP 1468, 1471-72.

Defense counsel objected, arguing that the statements are not admissible under ER 801(d)(1) because they were made when Daniel had a motive to fabricate and he has admitted that he lied during the interview. 11RP 1469-71. Counsel argued further that if the State wanted to admit specific statements as prior consistent statements, it needed to specify the statements and introduce them through witnesses. Counsel objected to admitting the entire recorded interview even with redactions. 11RP 1476.

The court summarized ER 801(d)(1) and determined that there are two factual predicates that the State must meet in order to admit the statements:

That is, one, as pointed out in the rule, that here the defendants have challenged the veracity or credibility of the witness, and not just in a

generalized way, but in more specific ways, in which both defendants did I think both defense counsel have conceded they have.

The second predicate that needs to be present is that *there has to be, or at least according to the case law, the prior consistent statement must predate any alleged offer of leniency or favoritism or what is what essentially the courts are calling a motive to lie.* And I think all parties have conceded that that is the case here, it was not a proffer statement.

11RP 1479-80(emphasis added).

When defense counsel pointed out the statements were made before the proffer but not before the motive to lie, the court reiterated:

. . . you can always attach a motive to lie to a defendant who is being interrogated by the police, but that's not what the cases are talking about. It's not a generalized motive to lie. *The motive to lie comes because there is some sort offer of leniency, some kind of even bribe, or the like. That is what the Court is looking at for a motive to lie,* and because that wasn't present under these circumstances, my understanding is and everybody conceded, that this was not a proffer statement and there were no discussions about a deal with Mr. Daniel Davis, and then that factual predicate has, in fact, been met.

11RP 1480-81(emphasis added).

The court admitted the recorded interview as "a prior consistent statement, finding that it is not hearsay."

11RP 1480.

The "mere assertion" that that a motive to lie may have existed at the time of the prior statement is insufficient to prevent admission. *State v. Makela*, 66 Wn. App. 164, 173, 831 P.2d 1109 (1992). The trial court must decide, as threshold matter, whether evidence of a motive to lie "rises to the

level necessary to exclude the prior consistent statement.” *Id.* at 173. “To do so, the trial court considers whether the witness made the prior consistent statements when ‘the witness was unlikely to have foreseen the legal consequences of his or her statements.’ ” *State v. McWilliams*, 177 Wn. App. 139, 149, 311 P.3d 584 (2013)(citing *Makela*, 66 Wn. App. at 169).

The record establishes that the court admitted Daniel’s recorded interview based on its erroneous view of the law that it was admissible as a prior consistent statement because it was “not a proffer statement.” The court erroneously understood that a motive to lie exists only when the witness has been offered “some sort of leniency, some kind of even bribe, or the like.” The court failed to consider whether Daniel was unlikely to have foreseen the legal consequences of his statements because it erroneously found that the recorded interview was admissible on the sole basis that it was not a proffer statement despite the fact that Daniel admitted that he had a motive to lie:

- Q. And then there were other statements that you made to police, and we don’t need to go through all of them, but you do remember making other statements to police so that the police believed that Mr. Reed was the one who forced you into a situation that you absolutely didn’t want anything to do with. That was what you were trying to tell the police, isn’t that right?
- A. Yes.
- Q. And you thought, well, if you did that, if you make him the really bad guy, him with the gun, he is the shooter, he threatens you, he coerces you, you thought that perhaps the

police might look favorably upon you; is that a fair statement, Mr. Davis?

A. Yeah.

Q. They might take pity upon you?

A. Yeah.

Q. They might decide to give you the deal because you were forced into a situation that you didn't want to be in. You thought about that, didn't you?

A. Yeah.

Q. And you thought, hey, if I can make Marcus Reed to be the shooter, and really the bad guy, maybe I might have a chance at another life and get a deal, right?

A. I guess you can say that, yeah.

6RP 839.

Daniel clearly foresaw the legal consequences of his statements made after his arrest. He testified further that he was afraid of “[g]oing to jail for a long time,” and he thought about making statements to try to save himself. 7RP 991, 995.

The record reflects that the court admitted the recorded interview without reviewing the transcript of the interview. The court told counsel that it did not have a copy of the transcript so it could not compare Daniel's prior statements with his trial testimony. 11RP 1477. Without reviewing the transcript, the court admitted the entire recorded interview with some redactions made by the State. 11RP 1471-72. Most of the hour-long recorded interview contained statements that were inconsistent and irrelevant. Ex. 113. As Daniel admitted during cross-examination, he

repeatedly lied to the detectives during the interview. 6RP 833-39; 7RP 955.

The trial court abused its discretion because it admitted Daniel's recorded interview as a prior inconsistent statement based on an erroneous view of the law. *Harvill*, 169 Wn.2d at 259. Moreover, the court abused its discretion because no reasonable judge would have admitted the recording in its entirety without reviewing the transcript to determine admissibility. *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004)(a trial court abuses its discretion when no reasonable judge would have reached the same conclusion).

“An error in admission of evidence requires reversal if it materially affected the outcome of the trial.” *State v. Sweeney*, 45 Wn. App. 81, 86, 723 P.2d 551 (1986)(citing *State v. Sanchez*, 42 Wn. App. 225, 231, 711 P.2d 1029 (1985)). The recorded interview was inadmissible as a prior consistent statement and inadmissible because it was irrelevant where it did not have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Daniel's recorded interview which was not a prior consistent statement had no tendency to prove or disprove the charged crimes. Evidence that is not relevant is not admissible as there “is no right, constitutional or otherwise,

to have irrelevant evidence admitted.” *State v. Darden*, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002); ER 402.

Even if evidence is relevant, it “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Darden*, 145 Wn.2d at 625 (quoting ER 403). Probative evidence “means having the effect of proof; tending to prove, or actually proving an issue; that which furnishes, establishes, or contributes toward proof.” *Black’s Law Dictionary*, 6th Ed., p. 1203. The probative value, if any, of Daniel’s recorded interview was substantially outweighed by the inherently prejudicial effect of the recording because as the State argued, without the recording, the statements “lose much of its heft when you don’t get to hear the speaker talk, you don’t get to hear his mannerism, his voice. . . .” 11RP 1477. The State argued to admit the recording rather than bringing in the statements through the testimony of the detective because the recording would have more of an impact on the jury. 11RP 1477. The jury was provided with a transcript when it heard the recording in court and then allowed to listen to the recording during deliberations which heightened the prejudicial effect of the recording erroneously admitted as a prior consistent statement. Moreover, the recording which contained

numerous inconsistent statements and Daniel's personal views which had no bearing on guilt or innocence was confusing for the jury tasked with the difficulty of discerning the evidence. Admission of the recording in its entirety undermined the purpose of the rules of evidence.

Reversal is required because within reasonable probability, erroneous admission of the recorded interview of Daniel Davis, the State's key witness, materially affected the outcome of the trial particularly when the State played the recording for the jury as the grand finale in its case in chief. 12RP 1726-28.

5. THE TRIAL COURT EXCEEDED ITS AUTHORITY BY ENTERING FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR A 3.5 HEARING HELD BY A PREDECESSOR JUDGE.

"The rule is well settled that a successor judge is without authority to enter findings of fact on the basis of testimony heard by a predecessor judge." *State v. Bryant*, 65 Wn. App. 547, 549, 829 P.2d 209 (1992)(citing *Tacoma Recycling, Inc. v. Capital Material Handling Co.*, 42 Wn. App. 439, 711 P.2d 388 (1985)(successor judge following a remand was without authority to adopt the findings and conclusions of original judge); *In re Woods*, 20 Wn. App. 515, 581 P.2d 587 (1978)(termination of parental rights remanded for entry of additional findings; new trial will be required if the trial judge has left the bench); *Wold v. Wold*, 7 Wn. App. 872, 503

P.2d 118 (1972)(findings of fact in dissolution were inadequate; new trial required because the judge was no longer on the bench). The *Bryant* Court concluded that, “[t]aken together, the case law and civil and criminal rules set forth the rule that a successor judge only has the authority to do acts which do not require finding facts. Only the judge who has heard evidence has the authority to find facts.” *Bryant*, 65 Wn. App. at 550 (citing CrR 6.11, CR 63). This rule applies even where the predecessor judge entered an oral decision or a memorandum decision. *Bryant* 65 Wn. App. at 549 (citing *State ex rel. Wilson v. Kay*, 164 Wash. 685, 4 P. 2d 498 (1931); *Hawley v. Priest Rapids Ice & Cold Storage Co.*, 172 Wash 71, 19 P.2d 400 (1933)).

The Washington State Legislature defined judicial officer and determined when a judicial officer is disqualified:

A judicial officer is a person authorized to act as a judge in a court of justice. Such officer shall not act as such in a court of which he or she is a member in any of the following cases:

(1) In an action, suit, or proceeding to which he or she is a party, or in which he or she is directly interested.

(2) *When he or she was not present and sitting as a member of the court at the hearing of a matter submitted for its decision.*

(3) When he or she is related to either party by consanguinity or affinity within the third degree. The degree shall be ascertained and computed by ascending from the judge to the common ancestor and descending to the party, counting a degree for each person in both lines, including the judge and party and excluding the common ancestor.

In the cases specified in subsections (3) and (4) of this section, the disqualification may be waived by the parties, and except in the supreme court and the court of appeals shall be deemed waived unless an application for a change of the place of trial be made as provided by law.

RCW 2.28.030 (emphasis added).

On September 3, 2015, the day the case was called, the trial court asked if the parties anticipated any pretrial motions. The State replied, “We are going to need to do a 3.5, certainly for Mr. Davis.” 1RP 10. On September 29, 2015, the State informed the court that a 3.5 hearing was previously held before Judge Felnagle with Davis’s prior counsel but no findings of fact and conclusions of law were entered. The State explained that it ordered the transcript of the hearing and would provide it to defense counsel and the court, and it appeared from the minute entry that Judge Felnagle ruled that Davis’s statements were admissible. 2RP 109. On October 13, 2015, the State brought to the court’s attention that it provided the court and defense counsel with its proposed Findings of Fact and Conclusions of Law for the 3.5 hearing and provided the court with the transcript. The court responded:

I did read through the transcript, as well as the State’s Findings of Fact and Conclusions of Law. When the parties think that they are prepared to ask the Court for either a signature [or] some other action, please let me know.”

2RP 156.

At sentencing on November 24, 2015, the State asked the court to address the matter regarding the Findings and Conclusions for the 3.5 hearing:

Mr. Williams: I believe the Court had an opportunity to review them before. I know the Court has made a request that we include a section that's reflected undisputed and disputed facts, and I don't think that there were any undisputed facts. So I believe that it's an agreed set of Findings of Fact and Conclusions of Law by all the parties.

The Court: Good.

Mr. Underwood: That is correct, although I was not counsel at the time. I did review the transcripts.

The Court: I have reviewed the Findings of Fact, Conclusions of Law, and it does comport with the findings by Judge Felnagle before he retired from the bench. Thank you, Mr. Williams, for making that addition with respect to the disputed facts.

15RP 1914.

Contrary to the trial court's determination, the Findings of Fact and Conclusions of Law signed by the court does not comport with Judge Felnagle's oral findings. CP 348-51. On March 21, 2014, Judge Felnagle held a 3.5 hearing on statements made by Damien Davis and two co-defendants during interviews with Detective Steven Reopelle. Supp CP ____ (Verbatim Report of Proceedings, 5/11/16). Detective Reopelle testified that he interviewed Damien Davis and Judge Felnagle admitted police reports and advisement of rights forms as evidence. RP 48-62; Supp CP ____ (Exhibit Record, 3/21/14) After hearing testimony, Judge Felnagle made an oral ruling:

The facts are all undisputed, and *I don't know if I need to go over this in any great detail. I am just going to really quickly hit the high points* because I don't think there is much dispute here about the analysis.

Each of the defendants was in custody, was taken to the same interview room, virtually the same thing happened in each case. They were given the rights form – well, not given. The detectives read from a rights form, the Miranda rights, those forms are all in evidence. The defendants acknowledged their rights and indicated they were willing to speak.

The rights were signed by each of the defendants. The answers to the two questions were documented by the detectives in each case. None of the defendants asked for attorneys, asked to stop the questioning, asked questions about their rights.

None appeared to have any trouble understanding. All seemed to be cooperative.

The time involved was not, in the Court's observations, excessive. There was no showing of force or threats. They all appeared to understand what was going on and acted freely and voluntarily in their decision to speak. I find that each has knowingly waived their rights and voluntarily given statements, after having been advised of their rights.

So, those statements, absent some other reason to exclude them, would be admissible at the time of trial.

RP 66-67 (emphasis added).

The Findings of Fact signed by the trial court include numerous findings beyond Judge Felnagle's oral findings. Additionally, contrary to Findings of Fact 9 and 10, Judge Felnagle did not find that Davis was not at any point under the influence of any mind-altering substance and never exercised his right to remain silent at any point during his contacts with law enforcement. CP 348-51; Furthermore, Judge Felnagle concluded that Davis's statements would be admissible at the time of trial "absent some

other reason to exclude them.” RP 67. Contrary to the Conclusions of Law signed by the trial court, Judge Felnagle did not definitively conclude that the “defendant’s statements to law enforcement on April 3, 2013, are admissible pursuant to CrR 3.5.” CP 348-51.

Under *In re the Matter of the Marriage of Crosetto*, 101 Wn. App. 89, 96-98, 1 P.3d 1180 (2000), a new trial is not required where the parties agree to allow the successor judge to rely on the record and the judge makes findings of fact based upon the original record. Here, the prosecutor and defense counsel did not explicitly state that they agree to allow the trial court to rely on the record but they agreed upon and signed the Findings of Fact and Conclusions of Law. However, although the trial court stated that it reviewed the transcript of the 3.5 hearing, it did not state that it reviewed the police report and advisement of rights form admitted as evidence at the hearing. 2RP 156; Supp CP ____ (Exhibit Record, 3/21/14). Unlike in *Crosetto*, the trial court did not review the entire original record.

As the Washington Supreme Court observed in *DGHI, Enterprises v. Pacific Cities, Inc.*, an oral announcement is not binding because the judge could change his mind at any time prior to final judgment. 137 Wn.2d 933, 947-48, 977 P.2d 1231 (1999)(citing *State ex rel. Wilson v. Kay*, 164 Wash. 685, 690-91, 4P.2d 498 (1931)(reversed where trial judge orally

announced decision but died before entering findings of fact and conclusions of law).

Reversal is required because the trial court did not have authority to enter findings of fact on the basis of a hearing held by a predecessor judge, it did not make the findings of fact based on the entire original record, the Findings of Fact and Conclusions of Law did not comport with Judge Felnagle's oral ruling, and this disqualification cannot be waived pursuant to RCW 2.28.030 which states that disqualifications may be waived by the parties only in the cases specified in subsections (3) and (4).

5. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED DAVIS HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND THE PRESUMPTION OF INNOCENCE.

The Sixth Amendment to the United States Constitution and article I, section 21 of the Washington State Constitution guarantee a criminal defendant the right to a fair trial and an impartial jury. *State v. Johnson*, 152 Wn. App. 924, 934, 219 P.3d 958 (2009). "Only a fair trial is a constitutional trial." *State v. Coles*, 28 Wn. App. 563, 573, 625 P.2d 713, review denied, 95 Wn.2d 1024 (1981)(citing *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956)). Under the cumulative error doctrine, a defendant may be entitled to a new trial where errors cumulatively produced a trial that was fundamentally unfair. *In re Personal Restraint of Lord*, 123 Wn.2d

296, 332, 868 P.2d 835 (1994). Appellate courts do not need to decide whether these deficiencies alone were prejudicial where other significant errors occurred that, considered cumulatively, compel reversal. *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992).

The record here establishes that reversal is required because the accumulation of errors denied Mr. Davis his constitutional right to a fair trial and the presumption of innocence: 1) the trial court erred in instructing the jury on general knowledge without instructing the jury on knowledge; 2) defense counsel was ineffective in failing to propose an instruction on knowledge; 3) the prosecutor committed misconduct by misstating the law, improperly applying the puzzle analogy to reasonable doubt, and impugning defense counsel during closing argument; 4) defense counsel was ineffective in failing to object to the prosecutor's misstatement of the law; 5) the trial court abused its discretion by admitting evidence as a prior consistent statement based on its erroneous view of the law; and 6) the trial court exceeded its authority by entering Findings of Fact and Conclusions of Law for a 3.5 hearing held by a predecessor judge.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Davis's convictions.

DATED this 20th day of June, 2016.

Respectfully submitted,

/s/ Valerie Marushige
VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant, Damien Raphael Davis

DECLARATION OF SERVICE

On this day, the undersigned sent by e-mail, a copy of the document to which this declaration is attached to the Pierce County Prosecutor's Office and Catherine Glinski, counsel for Marcus Reed.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of June, 2016.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, a copy of appellant's opening brief
to:

Damien Raphael Davis
DOC # 325304
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, Washington 98326

I declare under penalty of perjury under the laws of the State of Washington that
the foregoing is true and correct.

DATED this 20th day of June, 2016.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

MARUSHIGE LAW OFFICE

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